

1 **LUJAN AGUIGUI & PEREZ LLP**  
Attorneys at Law  
2 DNA Building, Suite 300  
238 Archbishop Flores Street  
3 Hagåtña, Guam 96910  
Telephone (671) 477-8064/5  
4 Facsimile (671) 477-5297

5 *Attorneys for Defendant Mary C. Garcia*

**FILED**  
**DISTRICT COURT OF GUAM**

JUN 25 2008 *chs*

**JEANNE G. QUINATA**  
**Clerk of Court**

6  
7 **IN THE DISTRICT COURT OF GUAM**

8  
9 UNITED STATES OF AMERICA,

CRIMINAL CASE NO. CR08-00004

10 vs.

**RESPONSE CONCERNING PERJURED  
TESTIMONY; CERTIFICATE OF  
SERVICE**

11 MARY C. GARCIA et al.,

12  
13 Defendants.  
14

15 COMES NOW, Defendant MARY C. GARCIA, through her counsels of record, and  
16 submits this response concerning perjured testimony in reply to the United States Memorandum  
17 Concerning Testimony Contradicting Prior Sworn Testimony filed on June 24, 2008. All  
18 counsels and co-defendants in the present case joins herein.  
19

20 The Government's duty to disclose exculpatory or impeaching evidence derives from due  
21 process guarantees to a fair and impartial trial. In Brady v. Maryland, the Supreme Court  
22 announced the rule that "suppression by the prosecution of evidence favorable to an accused  
23 upon request violates due process where the evidence is material to guilt or to punishment,  
24 irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194,  
25 1196 (1963). "[T]he constitutional obligation is [not] measured by the moral culpability, or the  
26 willfulness, of the prosecutor.... If the suppression of evidence results in constitutional error, it is  
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1 because of the character of the evidence, not the character of the prosecutor.” U.S. v. Agurs, 427  
2 U.S. 97, 110, 96 S.Ct. 2392, 2400-2401 (1976).

3 To establish a Brady violation, it must be shown that material exculpatory or impeaching  
4 evidence was suppressed by the government, either willfully or inadvertently, resulting in  
5 prejudice. Morris v. Ylst, 447 F.3d 735, 741 (2006). Evidence is material if there is a  
6 “reasonable probability that, had the evidence been disclosed to the defense, the result of the  
7 proceeding would have been different.” *Id.* A “reasonable probability” exists if there is “a  
8 probability sufficient to undermine confidence in the outcome.” *Id.* (citations omitted).

10 The defense submits that all known instances of past perjury, whether at the change of  
11 plea proceeding or otherwise, are material impeaching evidence. Had the evidence of past  
12 perjury been revealed, there absolutely would have been a reasonable probability that the result  
13 of the cross-examination would have been different. The defense would have been prepared and  
14 able to conduct a thorough and meaningful cross-examination. To the contrary, the defense  
15 stumbled upon the past perjury of one witness during cross-examination. Despite knowing that  
16 the witness either committed perjury at the change of plea proceeding or was committing perjury  
17 during her trial testimony, the Government remained willfully silent. Had the defense never  
18 asked the line of questions that exposed the perjury, the defense would have remained ignorant  
19 while the Government sat idly by knowing its witness either committed perjury in the past or was  
20 presently committing perjury. Because the defense had not been notified of the known perjury of  
21 a Government witness, the cross-examination, impeachment and ultimately the fairness of that  
22 portion of the trial were undermined.  
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1 The prosecution has an overriding duty to do justice:

2 The prosecuting attorney represents a sovereign whose obligation is to govern  
3 impartially and whose interest in a particular case is not necessarily to win, but to  
4 do justice. It is the sworn duty of the prosecutor to assure that the defendant has a  
fair and impartial trial.

5 Commonwealth of the Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1116 (9<sup>th</sup> Cir. 2001).

6 Further, a prosecutor's responsibility and duty to correct what he/she knows to be false  
7 and elicit the truth requires the prosecutor to act when put on notice of the real possibility of false  
8 testimony. Bowie, 243 F.3d at 1117-1118. The duty to act is not "discharged by attempting to  
9 finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it.  
10 Id. Importantly, a prosecutor "cannot avoid this obligation by refusing to search for the truth and  
11 remaining willfully ignorant of the facts." Id.

13 In the present case, the Government did not disclose the anticipated testimony of its  
14 witness regarding past or present perjury. Instead, the Government permitted the witness to  
15 testify, perhaps hoping that her past perjury would not be uncovered. An inference can be  
16 drawn, however, that by asking whether the witness had paid Defendant Lee, the Government  
17 knowingly set up the defense to impeach the witness with the stipulated facts contained in the  
18 witness' plea agreement. All along, the Government was aware that the witness would admit to  
19 lying at the change of plea proceeding. By failing to disclose the witness' past perjury and  
20 allowing its surprise revelation during cross-examination, the government's design afforded the  
21 defense an inadequate opportunity to prepare and to fully and meaningfully confront the witness.  
22

23 By virtue of its authority and its ultimate duty to do justice, the Government is held to a  
24 higher standard than defense counsels. The defense submits that the Government's conduct in  
25 failing to disclose all known instances of past or future perjury violates not only constitutional  
26 guarantees of due process and a fair trial, but also the paramount duty to do justice.  
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1 Government suppression of material exculpatory or impeaching evidence is intolerable  
2 whether at trial or on appeal. On appeal, a convicted defendant is entitled to a new trial if he can  
3 establish that the Government intentionally or inadvertently failed to correct materially false  
4 testimony relevant to the credibility of a key Government witness at the trial, including evidence  
5 concerning 'any understanding or agreement as to a future prosecution' between the witness and  
6 the Government. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972); Napue v. Illinois,  
7 360 U.S. 264, 79 S.Ct. 1173 (1964).  
8

9 Lastly, the Government entitled its submission as a "Memorandum Concerning  
10 Testimony Contradicting Prior Sworn Testimony." To characterize the perjured testimony of  
11 Government witnesses as "contradicting prior sworn testimony" is misleading and legal  
12 understatement. As aptly noted in Bowie:

13  
14 A lie is a lie, no matter what its subject, and, if it is in any way relevant to the  
15 case, the district attorney has the responsibility and duty to correct what he knows  
to be false and elicit the truth.

16 Bowie, 243 F.3d at 1115.

17 We submit that disclosure of known perjured testimony to the court and to the defense is  
18 an inextricable part of the prosecution's responsibility and duty to correct known falsehoods and  
19 elicit the truth.  
20

21 Respectfully Submitted: June 24, 2008.

22 LUJAN AGUIGUI & PEREZ LLP

23 By: 

24 LEILANI V. LUJAN, ESQ.

25 Attorneys for Defendant Mary C. Garcia

26 G-0051/929-00/LVL  
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1 **CERTIFICATE OF SERVICE**

2 I, Leilani V. Lujan, certify that I caused a copy of **DEFENDANT MARY C.**  
3 **GARCIA'S NOTICE OF JOINDER** to be served on the following individuals or entities on  
4 June 24, 2008, via hand delivery at the following address:

5  
6 Office of the United States Attorney  
7 Karon V. Johnson, Esq.  
8 Assistant US Attorney  
9 Suite 500, Sirena Plaza  
10 108 Hernan Cortez Avenue  
11 Hagåtña, Guam 96910  
12 *Attorneys for the United States of America*

13  
14 John T. Gorman, Esq.  
15 Federal Public Defender  
16 First Hawaiian Bank  
17 Maite, Guam 96910  
18 *Attorneys for co-Defendant Eun Young Lee*

19  
20 Mark S. Smith, Esq.  
21 Law Offices of Mark S. Smith  
22 456 West O'Brien Drive, Suite 102-D  
23 Hagåtña, Guam 96910  
24 *Attorneys for co-Defendant Marcelino J. Laserna*

25  
26 Cynthia V. Ecube, Esq.  
27 Law Offices of Cynthia V. Ecube  
28 207 Martyr Street, Suite 3  
Travel Pacificana Building  
Hagåtña, Guam 96910  
*Attorneys for co-Defendant John W.C. Duenas*

29  
30 Louie J. Yanza, Esq.  
31 MAHER YANZA FLYNN & TIMBLIN LLP  
32 115 Hesler Place, Ground Floor  
33 Governor Flores Building  
34 Hagåtña, Guam 96910  
35 *Attorneys for co-Defendant Joseph Pangelinan*

1  
2 Stephanie G. Flores, Esq.  
3 Quan & Lopez LLP  
4 Suite 202 Quan Building  
5 324 West Soledad Avenue  
6 Hagåtña, Guam 96910  
7 *Attorneys for co-Defendant Francisco S.N. Kawamoto*

8 Rawlen M.T. Mantanona, Esq.  
9 CABOT MANTANONA LLP  
10 Edge Building, Second Floor  
11 929 South Marine Corps. Drive  
12 Tamuning, Guam 96913  
13 *Attorneys for co-Defendant Margaret B. Untalan*

14 Dated June 24, 2008.

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LUJAN AGUIGUI & PEREZ LLP

By: 

LEILANI V. LUJAN, ESQ.

*Attorneys for Defendant Mary C. Garcia*